IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Petitioners

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
Respondents

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Federal Communications Commission has authority to stop a specialized common carrier from providing a duly tariffed new communications service on previously certified lines without making any finding that the public interest so requires?

STATEMENT OF THE CASE

In the decision below, the lower court held that the FCC could not, without a finding of public interest, stop a specialized common carrier from providing to the public over previously certified lines a validly tariffed new communications service.

Petitions for certiorari were filed on September 16, 1977, or shortly thereafter, by the American Telephone and Telegraph Company ("AT&T"), the United States Independent Telephone Association ("USITA", an assocation of non-AT&T telephone companies which, under various arrangements, share revenue with AT&T) and the Federal Communications Commission (the "FCC" or the "Commission"). The United States of America, the other statutory respondent below, has declined to join these three parties in petitioning for certiorari.

MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C Inc. (collectively, "MCI") are affiliated communications common carriers, operating a transcontinental system providing business and data long distance communications services among 37 metropolitan areas throughout the United States.

Background

In 1963, Microwave Communications, Inc. filed applications for authority to construct the first specialized common carrier microwave facilities between St. Louis and Chicago. The FCC ultimately granted these applications in 1969 after an extensive evidentiary hearing. Throughout these very protracted proceedings, AT&T maintained unrelenting opposition to the competition which would emerge by grant of the applications, alleging unsuccessfully that competition of this nature was, for various reasons, contrary to the public interest.[1]

[1] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970).

After the *Microwave* decision, many additional potential competitors to AT&T filed numerous applications for routes encompassing virtually all of the major business communities in the United States. The FCC, instead of addressing each set of applications on an individual basis, first initiated a broadly based rule-making proceeding to consider certain questions common to all these applications, including the question of whether permitting the entry of new competitors would be in the public interest. *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920), 29 FCC 2d 870 (1971), *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

The Commission's order instituting the *Specialized Carrier* proceeding provided that, once the specifically enumerated policy questions had been answered, it would "consider each proposal on its individual merits and follow such procedures as may be necessary to resolve any remaining questions pertinent to the particular set of applications." 24 FCC 2d 318, 327 (1970). The FCC also invited the parties to suggest additional questions for consideration in the rulemaking proceeding. The proceeding resulted in the adoption by the FCC of a general policy encouraging the competitive entry of new carriers in the intercity business and data communications field.[2]

One objective stressed by the Commission in reaching its *Specialized Carrier* decision was to "provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing re-

[2] 29 FCC 2d at 920.

quirements for specialized communications service." [3] The Commission stated that it was "clear that the proposed facilities and services of the applicants have several technical and service offering features which are different from those now provided by the established carriers." [4] From the outset, the new carriers have been expected to innovate. The Commission agreed with its staff's earlier conclusion that the new specialized carriers "would be under pressure to innovate to produce those types of services which would attract and retain customers." [5]

During the pendency of the *Specialized Carrier* proceeding, the Commission instituted another apposite rulemaking proceeding to consider a proposed requirement that all carriers, before instituting new services on existing facilities, obtain prior Commission consent. After deliberation, the FCC concluded, to the contrary, that both the established and new carriers should be free to institute new service offerings merely by filing tariff revisions rather than being required to obtain prior authorization from the Commission. *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities* (Docket No. 19117), 39 FCC 2d 131 (1973). The Commission stated, at 135, that:

> In connection with possible revisions of our tariff rules, we recognize that the termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules.

[3] 29 FCC 2d at 909.

[4] 29 FCC 2d at 919.

[5] 29 FCC 2d at 910.

After its *Specialized Carrier* decision, the Commission undertook detailed review of the individual specialized carrier applications and disposed of the other questions that had been raised in the petitions to deny filed by AT&T and its allies.

It is important to note that MCI's system, like the systems of other specialized carriers, is construed to provide communication capacity only between in-city terminals MCI has constructed in the cities it serves. It would be both economically burdensome and wasteful to expect the specialized carriers each to duplicate the existing facilities of the local telephone monopolies to extend beyond their in-city terminals out to the points to which their customers wished their communications brought. MCI realized, as did AT&T, that MCI would be dependent upon local telephone companies, primarily those of AT&T, to provide the required local interconnections between MCI's terminals and its customers' termination points.[6]

Throughout most of MCI's initial construction period during 1972 through mid-1973, MCI engaged in extensive negotiations with AT&T in order to obtain adequate interconnection. By the fall of 1973, however, it became abundantly clear that AT&T would not provide MCI with local interconnections required for certain services, including a private line service known in the industry as "FX" or "foreign exchange." FX is a service which, in the desired distant city, terminates in a business telephone arrangement, a device which, like a local telephone line, gives the private line subscriber access to switched local exchange service in the distant city. For example, with New York FX service, a businessman in Washington can reach—and can himself be reached by—all telephone subscribers in New York City.

[6] In *Microwave Communications, Inc., supra*, the Commission had retained jurisdiction in order to assure that AT&T would live up to its interconnection obligation.

To resolve the local interconnection dispute, the FCC, in December 1973, initiated a show cause proceeding against AT&T. While the Commission relied upon the record compiled in the *Microwave Communications, Inc.* and *Specialized Carrier* proceedings, it also afforded AT&T a further opportunity to justify its refusal to supply local interconnection. After extensive pleadings and oral argument by AT&T and other parties, the Commission reaffirmed AT&T's obligation to furnish MCI and the other specialized carriers with the local facilities needed for the rendition of all their services, including FX.[7]

Execunet

On September 10, 1974, MCI filed a tariff revision to set forth rates for a new category of specialized service called "metered use service."

Metered use service was designed for those business customers whose communications requirements are not sufficiently extensive to justify full-time private line service.[8] Metered use service was also designed to enable the

[7] *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *aff'd*, *Bell Telephone Company* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[8] For instance, a full-time private line between Washington, D.C. and Chicago is priced, under MCI's current tariff, at approximately $550 per month. By permitting a group of business customers to share a number of MCI's intercity circuits, however, MCI is able to reduce its costs to the point where the price to the customer of a one-minute Execunet call between Washington and Chicago is approximately 30¢. Execunet service entails a minimum charge of $75 per month (plus monthly recurring termination charges which average approximately $25) with the result that its market is limited to customers whose communications requirements to the limited number of cities served exceed the minimum charges. If the average distance of calls placed were equal to that between Washington and Chicago, the customer would have to use Execunet to the extent of 333 minutes per month. So, while Execunet service is attractive to a good number of businesses not having sufficient communications volume to justify a full-time private line, its attractiveness is in turn limited to those businesses which have substantial requirements among the cities served.

heavier-volume user to supplement his other MCI services and thereby obtain a more efficient mix of services matching his specific requirements. Metered use service allows MCI, through innovative service offerings, to attract new and supplemental business and thus produce sorely needed revenues to help offset its substantial fixed costs.

During the 30-day public notice period preceding effectiveness of MCI's metered use tariff revision, any competing carrier or otherwise interested party could have objected. None did so. The Commission also had the opportunity to question or challenge the tariff but did not do so.[9] As a result, the revision became effective on October 10, 1974. After arrival of required special equipment, MCI began marketing Execunet in January 1975. Execunet permits its users, in effect, to share FX circuits which terminate in a limited number of distant cities. One additional innovative feature distinguishes Execunet from other metered services. Instead of requiring that access to the Execunet network

[9] The FCC states, at page 10 of its instant petition, that, at the time MCI's metered use tariff became effective, the staff of the Commission was seeking clarification of the services the revision described, the desired inference being that the staff had from the outset questioned MCI's authority to provide Execunet service. This is an inference stated far more baldly in prior writings of the Commission and its counsel. However, in an affidavit filed with the lower Court on July 7, 1975, an officer of MCI categorically refuted this inference. He reported each conversation that had taken place between the staff and MCI regarding the tariff and made it clear that during none of those conversations had it even been suggested that MCI did not have authority to provide Execunet. Yet, this factually erroneous inference has surfaced time and time again. After failing to offer any evidence to the contrary, after denying MCI's Request for Admission as irrelevant and after refusing an MCI request for a hearing on the matter, it is inappropriate for the FCC to attempt to mislead the Court as to the nature and significance of the discussions that occurred between representatives of MCI and the Commission's staff.

be accomplished by means of a dedicated local distribution facility between the customer's office and MCI's terminal—thus limiting the customer's use of the service to times when he is in the office—MCI has devised a means (essentially a pre-programmed computer) which permits the customer to access Execunet when at the airport or at a supplier's office, for instance. However, despite its advantages to customers, Execunet does have its limitations.

Execunet is in fact a specialized business communications service provided to business users in 18 cities. As the switching hardware used by MCI will not accept rotary dial signals, Execunet can be accessed only by those customers who have, or are willing to incur the additional expense of installing, push-button phones [10] or other special equipment. Execunet is limited to those customers whose customary calling to the 17 other Execunet cities [11] is sufficient in quantity to justify: (a) the payment of a monthly minimum charge of $75, plus both calling city and distant city termination charges; (b) a thirty-day commitment to Execunet; and (c) a commitment to terminate Execunet service only upon thirty days' notice. Also, the offering of Execunet is restricted to those customers to whom the other substantial limitations of Execunet (*e.g.*, inability to place person-to-person, collect, or conference calls) are acceptable.

The MCI facilities used in Execunet service are shared among its subscribers, who are charged on an as-used, or metered, basis. Computerized hardware utilized in

[10] Only about 16% of telephones are push-button equipped, and of these, more than 80% are residential telephones. In view of the economic characteristics of Execunet service, residential users are highly unlikely to become Execunet customers.

[11] While AT&T's MTS users can reach every other telephone in the United States through more than 22,000 toll rate centers, and beyond that, can call 98.3% of the world's telephones, Execunet accesses only those telephones in the 17 other Execunet cities.

Execunet service [12] gives the user, after he has identified himself as "authorized" to use the service by pulsing in a preassigned identification code, the first available FX facility to the city desired. The same computerized hardware enables MCI to provide the customer with a detailed monthly invoice which lists each usage and its duration (expressed in tenths of a minute), indicating the number called and other valuable information permitting Execunet customers to allocate their intercity communications expenses easily and accurately.

The fact that the metered-use-service revision to MCI's tariff became effective without opposition encouraged MCI to acquire and install the substantial capital plant, primarily the computerized hardware apparatus, required for the provision of Execunet service.

The Agency Proceeding

In the spring of 1975, months after MCI began marketing Execunet, AT&T began a surreptitious campaign of *ex parte* presentations to members of the Commission and its staff against MCI's Execunet service. At the time, MCI knew nothing of this campaign, but learned of it only later.[13] Even now, however, MCI does not know

[12] MCI's Execunet hardware is sometimes called "switching equipment", but this is inaccurate terminology to the extent that it conjures up a picture of the immensely complex system of hierarchical step switching, with alternative routes capacity, used by AT&T to provide its MTS service. MCI's equipment merely identifies the city to which a particular call is being placed and then selects the appropriate direct FX facility.

[13] After repeated, largely unsuccessful attempts to put the full extent of AT&T's *ex parte* meetings on the record of this case, it is now nonetheless known from subsequently submitted affidavits that AT&T argued its case forcefully. It is known that AT&T used a tone generator (a device which produces push-button signalling) and various documentary materials to present its case. It is known that at least several of the Commissioners were personally involved in receiving AT&T's presentations. It is known that there was an arrangement between AT&T and representatives of a major non-Bell telephone company to obtain an Execunet authorization

every consideration and argument AT&T advanced, and the Commission has rejected every attempt by MCI to find out.

MCI's first notice of potential controversy came in the form of a brief letter, dated May 19, 1977, from AT&T to the Commission's Chairman, which the Chief of the Commission's Common Carrier Bureau forwarded to MCI two days later. The AT&T letter was a scant page and a half, contained a purported description of Execunet service, alleged that Execunet was identical to AT&T's long distance message telephone service, claimed (without citation to any authority) that Execunet was beyond MCI's authority and asked that the Commission "take appropriate enforcement action to stop the unauthorized Execunet service." In forwarding the AT&T letter to MCI, the Common Carrier Bureau Chief indicated that MCI's "comments on this matter would be appreciated."

MCI responded to the Bureau Chief's request in a seven-page letter denying in some detail each of AT&T's conclusary allegations. Four days later, MCI wrote a further letter to the Bureau Chief, stating its belief that AT&T's real objections to Execunet, apart from those set forth in its initial seemingly innocuous letter, had been presented in an *ex parte* manner, by telephone and in person, to members of the Commission and its staff prior to the time AT&T's letter had been written. MCI requested the Bureau Chief to obtain from AT&T the names of all its personnel who had spoken to Commission per-

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code for use in offering demonstrative evidence regarding Execunet to members of the Commission. It is known that one of the parties to this arrangement stated that: "We will bury MCI." It is known that at least one individual who occupies a decision-making position with the Commission made a remark showing that he had been influenced into reaching a firm adverse judgment against MCI. The unprecedented celerity with which the Commission acted in 1975 also makes obvious the effectiveness of AT&T's *ex parte* presentations.

sonnel about Execunet, the names of the people at the Commission to whom AT&T had spoken, the date and length of those conversations, the brochures or other materials used, and the substance of the oral presentations made. The Bureau Chief rejected MCI's request.

After a second more detailed AT&T letter, MCI wrote a third letter to indicate that MCI was preparing a detailed reply. The letter stated MCI's belief that AT&T, in its *ex parte* presentations, had completely pre-sold its position to the Commission and that, in order to respond effectively, MCI would have to be informed as to the scope and content of AT&T's presentations. MCI also pointed out that the Commission, in its 1973 decision in Docket No. 19117, *supra*, had decided that domestic carriers should be free to offer new classes of service merely by the filing of appropriate tariff revisions.

Less than 24 hours after delivery of MCI's third letter, the Commission sent MCI a letter order in which it rejected MCI's tariff "insofar as it purports to offer Execunet service." [14] The letter cited no statutory authority and contained no discussion of, much less any finding concerning, the public interest.

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[14] The Commission's letter order informed MCI for the first time that several Commissioners had had questions concerning Execunet service even before speaking to AT&T's representatives about it. The letter stated the Commission's understanding of Execunet service but failed to state how it had arrived at its understanding—or to concede that MCI had been given no opportunity to reply to anything other than AT&T's initial short conclusary letter. On the basis of the Commission's understanding, and on the basis of a paraphrase of the arguments set out in AT&T's second letter, the FCC declared that, "under the factual situation presented here," Execunet is "essentially a switched public message telephone service rather than private line." The FCC failed, and its failure persists to this day, to define "switched public message telephone service." Further, without even discussing its decision in Docket No. 19117, the Commission asserted that MCI was permitted to operate its facilities only for "private line service" and concluded that MCI must therefore cease providing Execunet within thirty days.

On July 3, 1975, MCI filed its petition for review with the lower court, and on July 7, 1975, it filed a motion to stay the effectiveness of the Commission's action. MCI's stay motion, which was opposed by the FCC, AT&T and USITA, was granted. Shortly thereafter, the FCC asked the lower court to hold its review in abeyance until the FCC could consider the matter further.

In the supplemental proceeding before the agency, MCI, in an attempt to be able to address specific alleged violations of the Communications Act, moved [15] that the Commission require AT&T, as the complainant in the case, to specify its objections to Execunet in a sworn formal complaint in accordance with Commission complaint procedures.[16] The Commission simply ignored MCI's motion and proceeded on the basis of permitting interested parties to file comments and then reply comments ten days later. The Commission denied MCI's motion for a hearing to discover the nature and import of AT&T's *ex parte* presentations.[17]

After the conclusion of oral argument late in the afternoon on May 24, 1976, the Commission, in a meeting which could not have lasted more than a few minutes,

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[15] Motion to Modify Procedures, December 5, 1975.

[16] The Commission's complaint procedures require that the complainant specifically set forth fully which provisions of the Communications Act, or of Commission rules, orders, or regulations, have been violated and how they have been violated. 47 C.F.R. § 1.722. The responding carrier is entitled to submit an answer within the time specified in the Commission's formal notice of complaint, 47 C.F.R. § 1.730, and may move to make the complaint more definite and certain. 47 C.F.R. § 1.731. In the Execunet proceeding, however, the FCC totally ignored its own procedural rules.

[17] The FCC also denied MCI's motion to depose the AT&T official who had given an affidavit to the lower court concerning the *ex parte* presentations and a motion to direct AT&T to preserve evidence concerning the *ex parte* presentations.

issued a brief public announcement [18] affirming its 1975 letter order and directed its staff to develop an opinion supporting its conclusion. The formal opinion was released on July 13, 1976.

The FCC opinion was premised on the argument that the certifications of MCI's lines were subject to an implicit condition limiting the services which could be provided over these facilities to "private line services." The opinion then proceeded to formulate a new definition for private line services which excluded MCI's Execunet service.[19]

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[18] FCC Report No. 11955, entitled "FCC Rules on Execunet Service".

[19] "Private line service," which petitioners argue is the permissible service universe for MCI, had never been given any precise meaning by the FCC prior to the proceeding below. As used in the industry, the meaning of the term evolved as new services were introduced. When the FCC stated that up until the Execunet case "there had been no confusion or debate over the meaning of private line service," (FCC App. 61a), it was technically, if not logically, correct. There had been no confusion because, up to that point, the definition had never been of decisional significance, and, just as there had been no debate, there had been no decision on how to define the term. The first decision definition of private line service appeared in Paragraph 61 of the FCC's 1976 Execunet order (FCC App. 62a), and this definition was created out of thin air. In a bold stroke, FCC counsel have created yet another definition of private line service especially for the present petition (pet., p. 6). This definition, which includes dedication of facilities "in some meaningful respect" to a customer's personal use, "instant connection without the need for dialing," and charges "at a flat periodic rate," contains elements at variance with those services which even the Commission decision below classifies as private line (FCC App. 63a; *see id.* 151a).

AT&T's petition (p. 5, n.8) refers to Section 21.2 of the FCC's rules, 47 C.F.R. § 21.2 (1976), for a definition of private line service. This outdated definition is not relied upon by the FCC, as it does not encompass services, such as FX, which AT&T itself includes in its own private line tariff. The FCC also classifies FX as a private line service. The court below (FCC App. 17a) recognized that the FCC has not applied the definition in Section 21.2 to Subsection I of Part 21, under the terms of which MCI receives its authorizations.

In the lower court, MCI argued, not only that its certifications were not subject to pre-existing service limitations, either explicit or implicit, but also that, even if it were assumed *arguendo* that MCI were limited to "private line" service or "specialized" service, Execunet would fall within either of these categories. MCI also argued that it had been deprived of its due process rights in view of the undisclosed nature of AT&T's *ex parte* presentations and in view of the FCC's curtailing of its normal hearing processes. These secondary arguments were rendered moot when the lower court reached its decision that there were in fact no pre-existing conditions on MCI's facility certifications. If the relief requested by petitioners were granted and the lower court be reversed, it would, of course, be necessary for the lower court to address these additional questions on remand.

ARGUMENT AGAINST GRANTING CERTIORARI

Summary

The decision below, which was unanimous, is based upon the court's interpretation of the unambiguous language of Section 214 of the Communications Act of 1934, 47 U.S.C. § 214. The court's interpretation was clear, straightforward and correct. There is no constitutional issue at stake. Further, the decision does not deprive the Commission of authority or ability to regulate effectively. Indeed, the decision specifically points out that the commission is fully empowered to conduct a hearing on the basic issue of public interest which lies at the heart of the controversy.

In the proceeding below, the FCC did not purport to make any public interest determination but, instead, reached its conclusion on the basis of a contention that pre-existing implicit restrictions on the certifications of MCI's lines obviated any need to consider whether the

public interest required that MCI be prohibited from using its previously certificated lines to offer Execunet service. The agency's contention in this regard is inconsistent with prior statutory interpretation and administrative practice.

The lower court's decision mooted a number of hotly contested questions, such as whether MCI's Execunet service could be categorized as a "private line service" or "specialized service", whether the FCC's orders had been tainted by AT&T's initial *ex parte* contacts and whether the Commission's procedures were otherwise compatible with the requirements of due process. Instead, the lower court's decison permits the Commission to address now instead the fundamental issue of public interest, rather than the artificial and sterile question of how to categorize new and rapidly changing communication services with outdated and vague terminology.

The lower court's decision is not at variance with the holding of any other court decision. The statements cited by petitioners from decisions by two other courts are merely prefatory and, not even rising to the status of dicta, are of no decisional significance. The decision below is the first and the only judicial decision to consider whether there are implicit restrictions on the certifications of lines of specialized carriers to limit the services that can be offered thereon. The lower court's holding is based, not upon any ambiguous or conflicting law, but rather upon the plain and, in fact, inescapable meaning of the statute.

The lower court's decision gives AT&T another full opportunity to demonstrate to the Commission why the public interest requires that competing common carriers be restricted from providing certain categories of service. While the issue of competition's role in the telecommunications industry is perhaps an interesting one, the petitions for certiorari do not, and in fact cannot, bring that

issue before this Court in the present case. The lower court's decision will also give the current members of the Commission the opportunity to consider the merits of AT&T's public interest contentions, free of any distortions that may flow from a misconception as to what their predecessors may or may not have intended.

I. The Lower Court Accurately Interpreted Section 214 of the Communications Act

Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), provides for certification of "lines," not services. A "line" is defined by Section 214(a) to mean any "channel of communication established by the use of appropriate equipment . . . ." While under Section 214(c) the Commission may attach "to the issuance" of a certificate "such terms and conditions as in its judgment the public convenience and necessity may require," absent such terms and conditions, Section 214 does not require new certification when previously certified lines are used for new services. A new classification of service, not involving the construction, extension, acquisition, or operation of a new line, is initiated by a tariff filing. *Long Island R.R.* v. *New York Cent. RR.*, 281 F.2d 379 (2d Cir. 1960); *New York Dock Ry.* v. *Pennsylvania R.R.*, 62 F.2d 1010 (3d Cir.), *cert. denied*, 289 U.S. 750 (1933). Tariff filings designed to offer a new service over existing facilities are governed by the procedures and criteria established under Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204 and 205.

Section 214 of the Communications Act was patterned after Section 1 (18-22) of the Interstate Commerce Act, 49 U.S.C. § 1 (18), which was enacted to regulate the construction or acquisition of railroad lines.[20] Under the Interstate Commerce Act scheme of regulation, the ICC

[20] *See* S. REPORT No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. REPORT No. 1850, 73d Cong., 2d Sess. 6 (1934).

certified the introduction of new railroad lines and used tariff procedures to regulate the services provided over those lines. Railroads did not require new certifications to introduce new rolling stock or to carry new commodities. For example, a railroad which had initially justified the use of a line to carry lumber on flat cars drawn by steam locomotives might use the same tracks later, without further certification, to carry chemicals in tank cars or fresh vegetables in refrigerated cars drawn by diesel-powered locomotives. All these changes could take place despite the fact that, in initially certifying the line, the ICC had considered only the carriage of lumber in weighing the public need for construction of the line. The same statutory language and practice were carried over to the communications industry. Thus, it is possible for a communications common carrier to initiate new communications services on previously certificated lines without further certification. For instance, when AT&T developed the switching equipment to provide Direct Distance Dialing, it used previously certificated lines for the provision of MTS (the universal voice message service using the switching technology) without any further certification. Years later, AT&T introduced its new Wide Area Telecommunications Service (WATS), again without any new certification of existing lines.

As the court below observed, the primary purpose of Section 214(a) is the prevention of unnecessary and uneconomic duplication of facilities and not the regulation of services (FCC App. 21a). For instance, the right of Western Union Telegraph Company to introduce, without further certification of its existing lines, its new "Mailgram" service,[21] a far greater departure from ear-

[21] Western Union provides Mailgram in collaboration with the U.S. Postal Service. Messages from a number of different Western Union sources are received by Postal Service teleprinters and then delivered in the ordinary local mail to the designated recipient. Needless to say, this service was not even contemplated at the time most of Western Union's lines were certificated.

lier services than is MCI's Execunet service, was upheld in *United Telegraph Workers* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970).

The obviously limited function of the certification process is, indeed, made doubly obvious by the final provision to Section 214(a) which states expressly that:

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any . . . changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Clearly, the offering of a new service, like any other change in operation, does not require any further certification of the line unless the original certification has been made subject to a lawful condition which precluded that service.

Section 214(c) of the Communications Act, 47 U.S.C. § 214(c), which controls the imposition of conditions, provides, in relevant part, that (emphasis added):

> The Commission shall have power to issue such certificate as applied for, . . . or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.*

The court below held that the "Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that 'the public convenience and necessity [so] require'" (FCC App. 24a). In so doing, the court was merely restating the express command of Section 214(c).

Indeed, the Commission itself implicitly recognized this legal standard when it took the position, in its 1975 letter order, that explicit conditions had been imposed

on MCI's certifications (FCC App. 101a). But, in its 1976 Decision, the Commission acknowledged that the cited language applied only to some of MCI's authorizations[22] and concluded, effectively abandoning the argument, that "thus it is necessary to look further" (FCC App. 49a). It was only after the agency realized that it would need "to look further" that it developed its novel theory of *implicit* conditions, a theory found wanting of support by the lower court.

In shifting to a theory of *implicit* restrictions upon MCI's facility authorizations, the Commission ignored its own subsequent and more explicit determination regarding the introduction of new services set forth in Docket No. 19117, *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications on Interstate or Foreign Common Carrier Facilities*, 39 FCC 2d 131 (1973), where it concluded that it "should not impose at this time any requirement for prior approval of new or revised service offerings by existing or new carriers," 39 FCC 2d at 133. The Commission's decision in Docket No. 19117 made "it possible for domestic carriers, as a general rule, to offer new classes or

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[22] The orders cited involved only a handful of MCI's lines and were issued during the period when, *prior* to the agency decision in Docket No. 19117, *supra*, the Commission had, as a tentative step—contrary to traditional practice—imposed conditions upon all of its Section 214 certifications of both MCI and AT&T facilities—conditions subsequently removed when the Commission reached its decision in that proceeding. The cited language, in any event, was not intended to be restrictive as asserted, but represented merely a general description of the services proposed by MCI at that time, analagous to the railroad initially justifying its construction of a new line by reference to the carriage of lumber drawn by steam locomotive. The interpretation by the 1975 Commission of that language depended on its own narrow and unsupported interpretation of the term "private line" used therein, which in any event was qualified in the language cited by the word "essentially" and further qualified by the addition of the phrase "and other communications."

subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions," 39 FCC 2d at 135. Not surprisingly, neither the FCC nor AT&T in their petitions for certiorari discussed or even acknowledged the existence of this decision—despite the fact that it had been treated extensively both by MCI and the Court of Appeals below.

Prior to the Commission's action of July 2, 1975 with respect to Execunet, the policy reaffirmed in Docket No. 19117 had governed the telecommunications industry. Departure from that long standing policy, which appeared to be the initial thrust of Docket No. 19117, was conceived as a corollary to the *Specialized Carrier* decision, *supra*, in which the Commission, while concluding that competing carriers should be encouraged to develop new service offerings, perceived what appeared to be a potential danger to its policy. The Commission, in its Notice of Inquiry in Docket No. 18920, the *Specialized Carrier* proceeding, had said, 24 FCC 2d at 331:

> We note in this connection that the applicants are in a disadvantageous competitive position vis-a-vis AT&T insofar as prompt inauguration of the proposed services is concerned. Action on their applications may be delayed for some time by the necessity of resolving claims in petitions to deny, *inter alia*, that the showing of need is inadequate. Since AT&T has numerous long line facilities, both cable and radio, and many diverse routes, it generally has enough flexibility and spare capacity to institute new services (at least on a limited scale) without having the immediate necessity of obtaining authorization for new or modified facilities. Therefore, AT&T need only file a tariff in order to commence providing service on its authorized facilities. AT&T is thus in a position to offer at any time services with many of the features proposed by the applicants, while challenging the showings of need made by would-be new entrants and claiming that hearings are required on their proposals.

It was to correct this inequity that the Commission began, as a tentative measure, attaching conditions to facility authorizations of both the established and new carriers. In instituting Docket No. 19117, the Commission was seeking to provide a reasonable opportunity for the competitive development of the market for specialized communications services. On the record made in that proceeding, however, the Commission reversed its initial direction and determined that it would not treat new service offerings as requests for new certification under Section 214 of the Communications Act, 47 U.S.C. § 214. It would, instead, treat tariff filings offering new services like any other tariff revisions submitted by carriers under the provisions of Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204 and 205.

As indicated, the Docket No. 19117 decision restored the practice that had been traditional in the domestic common carrier field. When in 1960 AT&T sought to introduce a new service it called WATS, it did not apply for any new certifications. It merely filed a tariff which offered the service over its previously authorized facilities.[23] The Commission's decision in Docket No. 19117 not to impose the limitations initially proposed constitutes a rule of general applicability. The Commission concluded that it "should not impose at this time *any* requirement for prior approval of new or revised service

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[23] Pursuant to Section 204 of the Act, the Commission instituted an investigation into the lawfulness of the tariff, to determine whether the offering complied with Sections 201 and 202 of the Act. However, there is no indication, in either the Common Carrier Bureau's recommended decision (37 FCC 688 (1964)), or in the Commission's order terminating the WATS proceeding (38 FCC 475 (1965)), that AT&T was subject to any requirement that it obtain *prior* authorization for the offering of the new service.

offerings by *existing* or *new* carriers." 39 FCC 2d at 133 (emphasis added).[24]

* * * *

In its petition, the Commission confuses the statutory provision for certifying communications common carrier lines found in Section 214 of the Communications Act of 1934 [which, as noted at footnote 3 (page 3) of the FCC's petition, was patterned after Section 1 (18-22) of the provision of the Interstate Commerce Act regulating railroads, 49 U.S.C. § 1 (18)] with the disparate provisions of the Motor Carrier Act of 1935 regulating motor vehicle common carriers and motor vehicle contract carriers. The Motor Carrier Act of 1935 has been designated as Title II of the Interstate Commerce Act and is found at 49 U.S.C. § 301 et seq. The issuance of certificates of convenience and necessity to motor vehicle *common* carriers is governed by 49 U.S.C. § 306 while 49 U.S.C. § 309 provides for the issuance of permits to motor vehicle *contract* carriers to engage in particular services. As noted in the Court's decision in *Noble* v. *United States*, 319 U.S. 88, 90 (1943), Section 209(b) of the Motor Carrier Act of 1935, 49 U.S.C. § 309(b), provides that the "Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof." In *Noble*, the Court observed that the statutory requirement to specify the "business" of a contract carrier in a permit meant specifying the scope of the articles carried. In applying this principle to the

[24] Indeed, the Commission specifically pointed to the tariff filed by Microwave Communications, Inc., to be effective on one day's notice, on January 1, 1972, as the kind of tariff which would have been delayed, contrary to the Commission's objectives in the *Specialized Carrier* proceedings, if it had been subject to the kind of prior approval requirement under consideration in Docket No. 19117. 39 FCC 2d at 134.

"grandfathering" of a pre-1935 contract carrier operation, the Court upheld the ICC decision that the grandfathering clause of that statute could not be used to "enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935," and declared that "the result in the present case would be a conversion for all practical purposes of the contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act." 319 U.S. at 92.[25] In the present case, the FCC would convert MCI, for all practical purposes, from a common carrier into a contract carrier—a category Congress did not create in enacting the Communications Act.

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The difficulty petitioners' counsel have in finding anything even remotely inconsistent in the lower court's exposition of the clear meaning of Section 214 is reflected in their attempt to rely upon *Hawaiian Telephone*

[25] The FCC petition gives the impression that, in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 299-300 (1974), this Court made a substantive ruling concerning the lawfulness of a motor carrier certificate to the extent that it exceeded the scope of the application. This impression is misleading. This Court reversed a district court decision setting aside an ICC grant of certificate on other grounds and, since the district court had not ruled on the claim by several parties regarding the grant of authority in "excess" of that sought in the application, remanded the case to the court—noting that the "issue was not briefed or argued here." 419 U.S. at 299. Upon remand, the district court upheld the ICC certificate insofar as it included service to Montgomery, Alabama despite the fact that service to Montgomery had not been included in the initial application. *Arkansas-Best Freight System, Inc.* v. *United States*, 399 F. Supp. 157, 162 (W.D. Ark., 1975) *aff'd*, 425 U.S. 901 (1976). The district court did overturn the ICC decision to the limited extent of eliminating the possibility of "tacking" or joining the lines being certified to Bowman in the proceeding under review to other lines certified to Alabama Highway Express which Bowman acquired subsequent to the hearing. The question of "tacking", of course, relates to the definition of lines being certified and not to the question of what services may be offered over the lines.

Co. v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974). The opinion in that case was written by Judge Wilkey who joined in the opinion of the court below with Judges Wright and Tamm. The opinion below pointed out that *Hawaiian Telephone* does not "transmogrify" Section 214 so that carriers must obtain Commission approval before implementing new services (FCC App. 21a-22a).

The reference by FCC counsel to *Hawaiian Telephone* and *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) is a non-sequitur. It is of course necessary to consider proposed services in determining whether there is a public need for proposed new lines, but such consideration does not imply that the lines can be used only for service initially proposed. As the lower court observed, there is "no indication that the *Hawaiian Telephone* court contemplated such a remarkable result." (FCC App. 23a).[26]

II. The FCC's *Specialized Carrier* Decision Did Not Result In the Imposition of Conditions Upon MCI's Authorizations

No conditions limiting service are on MCI's instruments of authorization. Indeed, MCI's facility certifications, like those of AT&T, are issued under Subpart I of Part 21 of the Commission's Rules, governing the "Point-to-Point Microwave Radio Service."[27] Unlike other subparts of Part 21,[28] Subpart I imposes no service limitations as to facilities authorized thereunder. In fact, such facilities are specifically subject to the provision of 47 C.F.R. § 21.705, which states that carriers subject to

[26] Indeed, *Hawaiian Telephone* and *RCA*, like the decision below, represent a strong judicial insistence that the FCC make the required statutory public interest findings.

[27] 47 C.F.R. §§ 21.700 to 21.713.

[28] *See, e.g.*, 47 C.F.R. §§ 21.903(b), 21.509 and 21.606.

Subpart I are "authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization . . . ."

In its 1976 decision, the FCC recognizes "the truism that a carrier need not generally file an application for each new service it wishes to offer" (FCC App. 55a), but then proceeds to state that a tariff "cannot be used to reverse a *clearly defined* Commission policy." (Emphasis added). In so doing, the Commission tries to jump the large gap between an explicit condition properly imposed pursuant to Section 214(c) to a "clearly defined Commission policy." It then attempts yet another large jump from the notion of a "clearly defined Commission policy" to the highly dubious inference it purports to draw from the *Specialized Carrier* decision to the effect that the specialized carriers are to be limited to some theretofore ill-defined service category called "private line services."

The *Specialized Carrier* decision made clear the Commission's desire to encourage and stimulate innovation. In so promoting innovation, the 1971 Commission must have recognized that the services to be offered by the new carriers could not realistically be limited within the narrow ambit of what AT&T chose to include in its own list of "private line" services. Indeed, the 1971 Commission had before it at the time a novel switched, metered service proposed by another specialized carrier—a service which was subsequently initiated and made available for several years.[29]

The Commission, in issuing its Notice initiating the *Specialized Carrier* proceeding, stated the following as the primary issue:

[29] See discussion of the service of Data Transmission Company, 29 FCC 2d at 872.

> A. Issue A: Whether as a general policy the public interest would be served by permitting new entry in the *specialized communications field*; . . . (29 FCC 2d at 880, emphasis added).

It also noted (Para. 27 of the staff's analysis, *quoted*, 29 FCC 2d at 881) that: "In its *MCI* decision, the Commission granted applications of MCI to provide *specialized interstate common carrier services* . . . ." (Emphasis added). And, in its decision, the Commission stated its ultimate conclusion as follows:

> *Findings and conclusions.* 103. In light of all of the foregoing and the record as a whole, we adopt our staff's analysis of Issue A, as amplified and modified herein. We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the *specialized communications field* is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a *general policy* in favor of the entry of new carriers in the *specialized communications field* would serve the public interest, convenience, and necessity. (29 FCC 2d at 920, emphasis added).

In embarking upon and concluding its forward-looking proceeding to consider the introduction of new carriers, the Commission was not confining its consideration to any narrow category of private line services—though it discussed such services [30]—but rather was dealing with

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[30] The term "private line service" was used generally in the context where comparisons were being drawn to AT&T services—since that term was an AT&T term and it most closely approximated the types of service initially contemplated by the new

a broader, more general, but undefined, area which it called "the specialized communications field."

The court below observed that, "to the extent that any definition of a 'specialized carrier' emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See* [29 FCC 2d] at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70)" (FCC App. 29a, fn. 68). Indeed, the lower court defined a "specialized carrier", in another case, as one "whose service is of possible use to only a fraction of the population." *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). The limited number and capacity of the transmission facilities used by specialized carriers assure that their service "is of possible use to only a fraction of the public." No condition on certifications was required to establish this limitation, and none was suggested.

In the *Specialized Carrier* proceeding, the Commission was addressing specific questions of public policy. Other questions were left for treatment in the context of action upon individual applications and, in the case involved here, for treatment by general rule in Docket No. 19117. The Commission was not in the *Specialized Common Carrier* decision framing conditions which were to be attached, by any process of implication, to its later grants of specific authorizations.

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carriers. More generally, however, the 1971 Commission used such terms as "specialized private line services," "specialized communications services," "special communications services," "customized communications," "common carrier communications services," "competitive common carrier services," "data communications," "new communications services," "services that are heterogeneous in character," and other variations.

Indeed, the *Specialized Carrier* decision specifically acknowledged that alleged problems relating to new services should be handled in future tariff proceedings:

> In the event that adverse consequences to the public should develop, the Commission can take such action on the relevant tariff filings as may be necessary to protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.[31]

Petitioners make the new argument that MCI "never sought authorization beyond private line services." Quite the contrary, MCI specifically sought certification of its lines pursuant to the terms of Subpart I of Part 21 of the Commission's Rules, governing the "Point-to-Point Microwave Radio Services," which would permit it to offer any properly tariffed services which its limited facilities might be capable of providing. *See* 47 C.F.R. § 21.705, *supra*. MCI proposed no condition upon its certifications and none was imposed.

In order to demonstrate the need for its facilities, MCI set forth, in general terms, the types of services it proposed to provide initially.[32] It did not, however, propose to limit itself to those services for the indefinite future. Indeed, MCI dedicated itself from the outset to develop

[31] 29 FCC 2d at 886, note 26.

[32] In describing its prospective services MCI sometimes referred to them as "specialized" or "customized" services and, on relatively infrequent occasions, it used the term AT&T uses to refer to its nonuniversal services—"private line services"—as the nearest analogy in AT&T's vocabulary to what MCI was proposing to provide. The use of such broadly descriptive terms, however, was not intended to reflect a proposal that the Commission should impose restrictions on MCI's authorizations so as to inhibit it from developing variations of traditional services or new services in the future.

new and innovative services as its experience in the market and financial capabilities increased. The Commission clearly shared this expectation.

MCI had not conceived its Execunet service until long after 1971. Execunet, which is basically a variant of shared FX service, developed as a logical extension of MCI's experience with the dissatisfaction expressed by customers with the traditional FX service, whether provided by AT&T or by MCI. Although MCI believes that Execunet can properly be classified as a private line service, such a classification is basically irrelevant. MCI's purpose in discussing particular types of service in its applications was to show that there was a public need which would be fulfilled by construction of the facilities applied for. But just as the fact that certification of a new railroad line may have originally been justified by reference to the public need for the transportation of lumber does not prevent the railroad, in the future, from using the same line to provide other services which future experience may show the public desires, neither does the justification of new communications lines on the basis of the need for one service prevent a communications common carrier from using the lines for other services in the future.

The FCC argues that, for purposes of this case, telecommunications services can be divided on an *a priori* basis into two neat categories: private line services, which are open to competition, and "MTS," which is not. This simplistic dichotomy is, by no means, generally accepted.[33]

[33] For example, Lee W. Schmidt of General Telephone & Electronics, the largest member of USITA, recently stated that: "If you look at the evolution of technology of MTS and private line in the future, they are going to become more and more and more (sic) similar until they are all but indistinguishable." Preliminary stenographic transcript of the *Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives: Discussion on Domestic Common*

Although neither private line service nor MTS (message telecommunications service) had ever been defined with any precision prior to the Execunet case, the agency based its 1975 decision on its determination that Execunet is "identical to MTS" (FCC App. 103a) and its 1976 decision on the assertion that Execunet is "indistinguishable from MTS" (FCC App. 64a). From this it should follow that the FCC had at some point provided a protected monopoly status for MTS. Yet the FCC points to no proceeding where this supposed monopoly portion of telecommunications services was either defined or bestowed upon AT&T as a protected sanctuary free from competition. Indeed, in its petition the FCC states that the "suggestion in the opinion below that the FCC has 'granted AT&T a *de jure* monopoly over MTS and WATS' . . . has no foundation in the Execunet decision or any other FCC action." (FCC Pet., p. 18, n. 34). Further, the Chief of the FCC's Common Carrier Bureau recently testified before Congress that: "I am not aware that any determination has been made that there is a

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Carriers, September 21, 1977, pp. 17-77 [hereinafter, "*House Carrier Hearings*"].

Indeed, the Telecommunications Task Force established by AT&T together with the four largest "independent" telephone companies observed that:

> . . . it has become apparent that no clear distinction can be made between the competitive "private line service" and monopoly Message Telecommunications Service market. In economic terms, the two types of services are strong substitutes for one another, especially for large volume business users who constitute a significant portion of the Message Telecommunications Service market. In technological terms, too, the distinction between "private line service" and "Message Telecommunications Service" is rapidly dissipating.

THE DILEMMA OF TELECOMMUNICATIONS POLICY: AN INQUIRY INTO THE STATE OF DOMESTIC TELECOMMUNICATIONS BY A TELECOMMUNICATIONS INDUSTRY TASK FORCE, Part III, pp. 6-7.

natural monopoly, natural economic monopoly, in any part or certainly all telecommunications activities." [34]

Thus, in view of the absence of any condition upon MCI's certifications, it does not have any legal significance to liken MCI's Execunet to AT&T's MTS service. But, even if some legal significance could attach, Execunet clearly does not deserve being characterized as identical to or indistinguishable from MTS. The FCC, on an occasion when joined by the Department of Justice, defined public communications service for this Court as ". . . primarily . . . voice communication service from and to all points on an integrated national and international network, available to the public generally." Brief for the Respondents in Opposition at p. 3, *AT&T* v. *FCC*, 422 U.S. 1026 (1975) (Docket No. 74-1229), *denying cert. to Bell Telephone Co.* v. *FCC*, *supra*. Execunet clearly does not fall within that definition and indeed no service that MCI could possibly provide with its presently certified lines could fall within that definition.[35]

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[34] *House Carrier Hearings*, pp. 17-53.

[35] Before the FCC, before the Court below, and in the present petitions, the petitioners continue to shift terminology and definitions on what constitutes impliedly a protected monopoly portion of telecommunications services. The principal reference to MTS in the petitions is to "ordinary long distance toll service" (FCC Pet., p. 5), "ordinary long distance service" (AT&T Pet., p. 3), and "plain old message telephone service" (USITA Pet., p. 7). None of these terms is a term of art and none was used in the agency's prior decisions.

The FCC's retreat to the simplistic formula of "ordinary long distance toll service" continues the Commission's pattern of shifting from one imprecise term to another in an attempt to make the Execunet-MTS equation credible. In the proceeding below, the Commission did not attempt to counter MCI's showing of the absence of MTS characteristics in Execunet by revealing what it considered to constitute MTS. Instead, the Commission changed its undefined understanding of MTS in the Execunet-MTS equation to "basic, station-to-station dial MTS." Rather than define MTS, the Commission, when faced with the many critical dissimilarities be-

III. There Is no Conflict With Other Decisions

Petitioners cite *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), and *Bell Telephone Company of Pennsylvaia* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975) as being at variance with the court's decision below. Petitioners are incorrect. In the first of these cases, the Ninth Circuit rejected an attempt to reverse the *Specialized Carrier* decision and, in the second, the Third Circuit upheld the Commission's rejection of AT&T's attempts to deny interconnections MCI needed for the provision of its services.

In *Washington Utilities*, the scope of the services authorized in the *Specialized Carriers* decision was not at issue. The issues in that case were whether the FCC could authorize competition at all, whether the procedures utilized by the Commission were correct and whether the FCC violated the National Environmental Policy Act of 1969. The portion of the Ninth Circuit opinion referenced in the instant petitions is a simple

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tween Execunet and MTS, chose either to disregard MCI's points or to whittle away at what constitutes MTS by referring to many of its characteristics as nonessential "convenience features," "specialized, add-on services," or "billing procedures." The Commission further distorted the MTS-Execunet equation by adding WATS as a decisional factor in its 1976 decision. Unable to legitimately compare Execunet with MTS only, the Commission was forced to insert WATS into the final decision, even though there was no prior indication that WATS was in issue. Indeed, in the only record presentation on the characteristics of WATS, MCI submitted AT&T literature which described WATS as a private line service.

In its petition, the FCC goes one step further by urging that "MTS . . . includes . . . wide area telecommunications service (WATS)." Not even AT&T, which offers the service and created the terminology in the first place, agrees with the misleading and inaccurate statement that MTS includes WATS. The Court is left with a mishmash of undefined and imprecise terms.

general description of the services proposed in the specific applications then before the Commission. The court certainly did not observe any limiting conditions on the authorizations of the specialized carriers. Its description of the services involved was prefatory only, to indicate generally the communications needs that were being addressed, and did not form the basis for any of the court's holdings.[36]

Bell Telephone Co. v. *FCC, supra*, addressed Bell's refusal to provide various types of interconnections required for MCI's services. Bell's principal defense was the argument that it was required only to provide very limited categories of connecting facilities. Bell's secondary argument was that the Commission had not affirmatively

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[36] It should be noted that the court spoke of "entry of new carriers in the specialized communications field," 513 F.2d at 1155, 1159 and 1166. The court also obviously took a broad view of the non-static scope of this term, observing, 513 F.2d at 1166, n. 33, that:

"As the Commission had concluded, the public interest would be served by offering users flexibility and a wide range of choice. The applicants were seeking to develop a relatively new and potentially very large market with heterogeneous submarkets. The proposals reflected differing routes and services. The various systems might develop along different lines. The number of potentially successful operations might well depend on the ingenuity, enterprise, and initiative of the participants in developing new service and equipment."

The court did distinguish the services proposed by the new carriers "from public exchange and long distance toll telephone service" and explained that the "latter consists primarily of voice communications service from and to all points on an integrated national and international telephone network, available to the public generally." 513 F.2d at 1155. The limited nature of the facilities proposed by the specialized carrier applicants, of course, made "communications from and to all points on an integrated national and international telephone network" out of the question. The limitation noted was a *de facto* limitation inherent in the physical nature of the facilities involved and not one flowing from a condition imposed on authorizations pursuant to Section 214(c) of the Communications Act.

determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX service. The Commission's determination was that the *Specialized Carrier* decision had settled the point, whereas AT&T argued that, since MCI had never mentioned FX services explicitly in its § 214(a) applications, MCI's provision of those services had not been approved. The Third Circuit affirmed that the Commission in the *Specialized Carrier* decision had made an affirmative determination that interconnection for provision of private line services was, as a general matter, in the public interest and that MCI was covered by this general determination. Bell itself had long categorized FX as private line service.[37] *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. As the court below noted, however, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c). Indeed, the converse appeared to be at least implicitly conceded by AT&T in *Bell Telephone*. The Third Circuit observed, 503 F.2d at 1262, that "While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs."

The so-called "overbreadth argument" advanced by AT&T in *Bell Telephone*, is irrelevant here. AT&T's argument was that the Commission's order to interconnect services "presently or hereafter" authorized was overbroad and was directed to the difficulty of ascertaining the types of services to be authorized "hereafter." Under that decision, if MCI should in the future be authorized to build new facilities, so as to provide international service, for example, AT&T would be required to furnish interconnection. We are not, however, dealing here with the question of *new* authorizations, but rather the question of whether there are restrictive conditions on the old authorizations.[38]

[37] *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004, 1013 (E.D. Pa. 1973), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974); *Bell Telephone Co.* v. *FCC*, *supra*, 503 F.2d at 1261.

IV. There Is no Legal Question of Importance Ready for the Court's Review

In seeking to convince this Court that the decision of the court below should be reviewed, petitioners put forward an issue that the Court below did not have before it and consciously avoided deciding. The issue, as petitioners put it, is whether the public interest requires that some segment of the telecommunications market be afforded monopoly protection. This serious distortion of what the case under consideration involves is in effect an

[38] *American Telephone & Telegraph Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976), cited by some of the petitioners, is also inapposite. In that case, AT&T argued that specialized carriers were not permitted to offer private line services already offered by AT&T, but rather were limited to new services. There was no dispute concerning the offer of new services such as Execunet. The court recognized that the *Specialized Carrier* decision had adopted a policy in favor of open competition in the "specialized communications field," 539 F.2d at 768, and rejected AT&T's argument that the Commission could not authorize services "duplicating existing services." 539 F.2d at 772. The only matter at issue, and therefore the only matter addressed by the parties and the court, was the services that duplicate existing AT&T private line services. There was no finding that non-duplicative services, such as Execunet, were forbidden. Quite the contrary, it was tacitly assumed, even by AT&T, that non-duplicative services by specialized carriers were permitted. In the present case, AT&T contends the opposite, that the specialized carriers are limited to essentially duplicative services already provided by AT&T as "private line services."

admission by petitioners that the one substantive issue decided by the lower court—whether MCI's existing facility certifications were restricted to prevent its offering of Execunet service—is not of sufficient significance to warrant the attention of this Court.

AT&T, USITA and NARUC all offer arguments in favor of an AT&T-directed monopoly. The arguments they put forward are perhaps interesting ones, but they are not before this Court. The Court is being asked to review a decision where the proponents of monopoly failed to offer public interest arguments before the Commission and the FCC itself did not purport to act on any such basis.

A decision by this Court not to review this case will not have the effect of having petitioners' pro-monopoly assertions going unanswered and undecided. The lower court specifically invited the Commission to initiate a proceeding to determine where the public interest lies. In that proceeding, AT&T and its supporters can put forth the arguments relating to the public interest which they have prematurely set out in their current petitions.

MCI stands fully ready to meet the arguments AT&T and its supporters can raise in the Commission's new proceeding. Indeed, in the proceeding below, MCI presented the testimony of one of the country's foremost economic authorities in this area [39] to rebut AT&T's then claims of damage. This probative evidence speaks far more convincingly than do the unsupported and self-serving claims of counsel in the instant petitions. MCI also introduced numerous statements from Execunet users to explain in practical terms what the service meant to them.[40] MCI attempted to raise the public interest issue

[39] *See* Affidavit of Dr. William H. Melody, Attachment D to MCI's Comments filed on January 16, 1976 in the FCC proceeding below.

[40] *See* Attachment C to MCI's Comments filed on January 16, 1976 in the FCC proceeding below.

in the Commission proceedings below, but the FCC chose to ignore the evidence MCI offered and proceeded instead to argue that the matter could be determined on an *a priori* basis of an alleged interpretation of what the 1971 Commission had decided in its *Specialized Carrier* decision.

Petitioners seem almost reluctant to speak about MCI's "Execunet" service, speaking instead of "MTS" being provided by MCI. This fancy ignores the simple fact that MCI has very limited facilities already authorized—which serve only a relatively small number of cities and which have only a small amount of presently unused capacity. Such facilities are not capable of providing the universal message service that AT&T calls "MTS". The "fear" expressed by petitioners in this regard is unrealistic.

Petitioners attempt to buttress their feigned fear of MCI [41] by reference to other carriers. But the two other specialized carriers, Southern Pacific Communications Company and United States Transmission Systems, each has fewer transmission facilities certified than does MCI. Satellite carriers and value-added carriers are also cited, despite the fact that they were not treated at all in the 1971 *Specialized Carrier* decision in which the present Commission purports to find the imposition of certification conditions. In any event, they too have only limited transmission facilities already certified. The offering of new services by any of these carriers would require the filing of new tariffs which, under Section 203 of the

[41] For the last four quarters, AT&T has reported net income of more than one billion dollars per quarter. Last quarter, MCI had $876,000 in net income—less than one-tenth of one per cent of AT&T's income. As contrasted to AT&T's gross revenue of nearly $33 billion for the year ended December 31, 1976, the total revenues of *all* specialized and satellite carriers, as reported to the FCC for the same period, was less than $80 million—less than one-quarter of one percent of AT&T's revenues.

Communications Act, 47 U.S.C. § 203, could require ninety days' public notice before becoming effective. If there were sufficient reason to do so, the Commission has authority to suspend the effectiveness of such tariffs for an additional five months pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204.

The FCC adds the rather curious argument that the decision below casts doubt upon the validity of the grants already made to MCI. The certifications previously made are, of course, already final and not subject to further review. At the time they were made, clearly the burden of proof with respect to the need for any service restrictions lay on the opponents of the grants. The opponents, which are highly experienced and sophisticated, failed to demonstrate that the public interest required any service restrictions. The Commission's expression of concern over MCI's grants ignores the fact that many of AT&T's lines were certified at a time prior to the introduction of "MTS" and "WATS" and received no further certification when those services were provided over them. Thus, if the decision below were deemed somehow to "cast doubt upon the validity of MCI's certifications in view of the lack of some affirmative determination of public interest with respect to Execunet service," it would cast just as much doubt concerning the validity of AT&T's certifications made prior to the development of direct distance dialing and WATS in view of the lack of affirmative determination of public interest with respect to provision of MTS and WATS service over those lines. Yet the Commission expressed no such doubt. The reason is very simply that it has been interpreting Section 214 one way for AT&T and would interpret it another way for MCI. Petitioners are making mutually contradictory arguments when they contend, on one hand, that MCI and similar carriers will in a short period of time grow to such huge proportions as to seriously challenge

AT&T's MTS service and, on the other hand, that MCI will lose all its present authorizations.

The FCC also complains that it will have to decide whether "to take a chance on open-ended grants or to limit the grants because the public interest affirmatively requires limits" (FCC Pet., p. 19). But this was exactly the question the Commission already decided for both AT&T and the specialized carriers in Docket No. 19117, *supra*. It concluded there that it should make it possible for domestic carriers as a general rule to offer new classes or subclasses of communications service over duly authorized facilities merely by filing appropriate tariff revisions, 39 FCC at 135.

This Court should note that AT&T for some time has been employing its substantial political influence to gain Congressional aid for its efforts to perpetuate its *de facto* monopoly and eliminate all competition. It has succeeded in having introduced proposed legislation to accomplish this objective. S. 3192, 94th Cong., 2nd Sess. (1976); H.R. 12323, 94th Cong., 2nd Sess. (1976); S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). Among other things, AT&T's proposed legislation would prevent MCI and the other specialized carriers from providing the traditional forms of private line service to which it contends, in its instant petition, they should be limited. Indeed, AT&T's proposed legislation would limit the specialized carriers to services which cannot be provided by AT&T and would make it well nigh impossible for MCI to obtain authorization to do even that much. Both the Senate and House have held hearings on common carrier competition during the past year, and are considering a "basement to attic" revamping of the Communications Act.[42]

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[42] *See* Press Release of Subcommittee on Communications of the House Interstate and Foreign Commerce Committee of October 11, 1976. In another press release dated November 16, 1977, the Chair-

Thus AT&T already has, even without review by this Court, two forums in which to expound its views on the alleged need for Governmental protection of its monopoly. In the one forum, AT&T is attempting to change the statutory standard for certification of competing carrier lines, and in the other it is being given every opportunity to meet the existing statutory standard. While such questions may well at some point in the future be ripe for review by this Court, they simply are not before the Court in the present case. The lower court specifically decided to defer such questions to the Commission as the appropriate initial forum in which the proponents of monopoly should put forth their views.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

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man of the Subcommittee on Communication, Lionel Van Deerlin, said "the issue of competition in the telephone industry will be thoroughly explored."